Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

BRIAN SULLIVAN,

Petitioner,

v.

COUNTY OF SUFFOLK,
SUFFOLK COUNTY POLICE DEPARTMENT,
JOHN CAHILL and RENEE BUSCHOR, SUFFOLK
COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

CHARLES ROBERT, ESQ.
Counsel of Record
ROBERT, LERNER & ROBERT
100 Merrick Road
Rockville Centre, New York 11570
(516) 766-7700

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

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QUESTIONS PRESENTED

1. Does the application of a New York State lien law violate the Supremacy Clause by authorizing a lien to be placed against a tort recovery of a Medicaid recipient in contravention of federal law which does not allow a lien to be placed against a Medicaid recipient's assets during the Medicaid recipient's lifetime?

2. Does New York State's implementation of its subrogation and lien statutes to satisfy a Medicaid lien violate the Supremacy Clause by recouping medical assistance benefits from tortfeasors' assets that were intended to compensate plaintiffs for damages other than medical?

3. Does this Court's "literal text" standard applied to a remedial Social Security statute require that reimbursement of total Medicaid benefits be made only upon the death of a disabled beneficiary of a trust?

4. Does this Court's "literal text" standard applied to the federal Medicaid assignment statute require a Medicaid agency to pursue tortfeasors directly rather than impose a lien against a Medicaid victim's lawsuit recovery?

PARTIES TO THE PROCEEDING

Petitioner Brian Sullivan is the plaintiff, the appellant, and the petitioner in this action. He is a Medicaid recipient who established a federal court-ordered inter vivos trust funded with a 1997 lawsuit recovery based on a 1993 federal statute that provided for reimbursement to the State for an amount up to the total Medicaid funds expended to the Medicaid recipient during his lifetime from trust assets remaining upon his death.

The Respondent is the Suffolk County Department of Social Services (SCDSS) which is the Medicaid agency that administers the Medicaid program for the New York State Department of Social Services (State DSS) and the federal government. In the tort action, SCDSS appeared as the Medicaid lienor on behalf of SCDSS, the State DSS, and the federal government. The New York State Department of Health (DOH) has now replaced the New York State Department of Social Services as the single state agency that receives federal monies pursuant to a State Medicaid Plan in which the State has agreed to comply with all federal statutory and regulatory requirements.

STATEMENT OF JURISDICTION

Petitioner seeks a review of the April 23, 1998 Second Circuit Court of Appeals decision Sullivan v. County of Suffolk, 174 F.3d 282. Jurisdiction is invoked under 28 U.S.C. § 1254 (1) which provides that this Court may review the decision of a circuit court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The major constitutional and statutory provisions involved in this case are:

1. The Supremacy Clause - United States Constitution, Article VI, Clause 2.

> This constitution, and the laws of the United States ... shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

2. The federal Medicaid Anti-lien Statute - 42 U.S.C. § 1396p(a)(1) and (b)(1):

> No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except ..... Emphasis Added.
>
> No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except.... Emphasis Added. .

3. The federal 1993 Disabled Trust Statute- 42 U.S.C. § 1396p(d)(4)(A):

> A trust containing the assets of an individual

> under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter. Emphasis Added.

4. State Plan Mandatory Compliance with anti-lien statute - 42 U.S.C. § 1396a(a)(18):

> A State plan for medical assistance must - (18) comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medial assistance correctly paid, transfers of assets, and treatment of certain trusts; Emphasis Added.

5. State Obligation to Pursue Third Parties - 42 U.S.C. § 1396a(a)(25)(A):

> (T)hat the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers) to pay for care and services available under the plan. Emphasis Added.

6. State's duty to recover from legally responsible party - 42 U.S.C. § 1396a(a)(25)(B):

> (T)hat in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the cost of such recovery, the State or local agency will seek

reimbursement for such assis[illegible]e to the extent of such legal liability. Empha[illegible]dded.

7. State acquires rights of Medicaid recipient- 42 U.S.C. § 1396a(a)(25)(I):

> (T)hat to the extent that payment has been made under the State plan for Medical Assistance in any case where a third party has a legal liability to make payment for such assistance, the State [shall have] in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services." Emphasis supplied.

8. Medicaid recipient's assignment of rights to the State- 42 U.S.C. § 1396k(a)(1)(A):

> (1) (T)hat as a condition of eligibility for medical assistance.. the individual is required
> (A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute and assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party." Emphasis added.

9. State's duty to collect third party resources - 42 U.S.C. § 1396k (b):

> Such part of any amount collected by the State under an assignment made under the provisions of the section shall be retained by the State as is

necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual. Emphasis Added.

10. State Lien Statute-New York State Social Services Law § 104-b.

If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim, or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of assistance of such assistance and care furnished by such public welfare official on and after the date when such injuries were incurred. Emphasis Added.

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Petitioner BRIAN SULLIVAN respectfully requests that this Honorable Court issue a Writ of Certiorari and review the April 23, 1999 Second Circuit Court of Appeals decision Sullivan v. County of Suffolk, 174 F.3d 282 (2d Cir. 1999). Appendix A.

OPINIONS BELOW

On April 30, 1998, the district court held that a Medicaid lien must be satisfied prior to the establishment of a Supplemental Needs Trust. Sullivan v. County of Suffolk, 1 F. Supp. 2d 186 (E.D. N.Y. 1998). Judge Seybert relied upon the New York State Court of Appeals decision in Cricchio v. Pennisi, 90 N.Y.2d 296 (1997) which interpreted federal and state law.

Judge Seybert addressed the federal Medicaid anti-lien standard by following Cricchio and holding that the monies that had been paid by the defendant to the plaintiff were in fact not the monies of the plaintiff. Judge Seybert acknowledged that the federal Medicaid anti-lien statute prohibited a Medicaid agency from placing a lien on the property of a living Medicaid recipient. However, notwithstanding the federal anti-lien statute and based on her interpretation of the federal assignment statute, Judge Seybert held that the monies that the defendants had paid to the plaintiff were being held for the benefit of the Medicaid agencies, and not for the benefit of the plaintiff:

> Second, although both federal and state law bar the imposition of a Medicaid lien on the recipient's property before his death, the federal laws do not suggest that settlement proceeds become the property of the recipient before they are placed in the trust. Rather, the recipient has assigned his right to collect on his claim against the third party to the DSS to the extent of his medical assistance. See 42 U.S.C.§ 1396k. Id. at 189.

The district court did not address plaintiff's statutory

interpretation arguments. "Third, the Court need not reach plaintiff's myriad arguments with respect to agency interpretations of the statutes at issue." Id. at 190.

On April 23, 1999, the Second Circuit affirmed Judge Seybert's decision. Sullivan v. County of Suffolk, 174 F.3d 282 (2d Cir. 1999). The Second Circuit also rejected the appellant's statutory arguments that Congress intended that Medicaid recipients assign their causes of action to Medicaid agencies in order for the Medicaid agencies to recover payment of medical expenses directly from the defendant tortfeasors and not from the plaintiffs. Rather, the Second Circuit adopted the New York State Court of Appeals' hybrid subrogation-assignment holding and held that the Medicaid-lienor had a subrogation right to the monies paid by defendants to the plaintiff:

> We reject Sullivan's argument that deferral of reimbursement in no way alters the state's right to pursue its subrogation rights. Here, we agree with the district court that 'timing is everything' in the realm of reimbursement for Medicaid expenses from a third party. Sullivan, 1 F. Supp. 2d at 190. The Medicaid recipient cannot defer payment of settlement proceeds to which he has no right. Moreover, Medicaid recipients may not use supplemental needs trusts for the unintended purpose of sheltering judgment and settlement proceeds from Medicaid lienors. See Norwest, 159 F. 2d at 333. Therefore, we conclude that the federal Medicaid eligibility laws do not permit Sullivan to transfer tort settlement proceeds to a supplemental needs trust before he pays the DSS lien. Finally, we reject appellant's request for an allocation hearing to determine what portion of the settlement proceeds is payable to DSS because the District court properly relied on the stipulated amount of $200,000. Id. at 285. Emphasis Added.

At footnote 5, the Second Circuit adopted the April 6, 1999

New York State Court of Appeals holding in Calvanese v. Calvanese-Callahan, 93 N.Y.2d 111 (1999), that the Medicaid lien is a priority lien and Medicaid recipients do not have a right to an "allocation" hearing:

> Even if the parties had not stipulated the amount of the lien, an allocation hearing would not be necessary. The New York Court of Appeals recently held in Calvanese v. Calvanese, 1999 WL 213967*5 (N.Y. April 6, 1999) that the agency is entitled to full recovery once sufficient funds are made available by a responsible third party, regardless of what portion of the settlement is allocated to past medical expenses. Emphasis Added.

The Callahan petition for a writ of certiorari is pending. Index No. 99-80. The Court is advised that the same Supremacy clause- federal anti-lien statute argument is also raised in the pending Mc Neil v. State of Utah, Medicaid Section petition. Index No. 98.1729

STATEMENT OF THE CASE

Brian Sullivan is a 29 year old young man who was rendered a ventilator dependent quadriplegic when shot by a Suffolk County, New York police officer. In 1995 Brian Sullivan filed a claim pursuant to 42 U.S.C. § 1983 against the defendants who he alleged were legally liable for his damages.

Because of his horrific injuries, the Medicaid program paid his medical expenses. Upon applying for Medicaid, Brian Sullivan assigned to the Medicaid program the right of the Medicaid agency to secure reimbursement from the third party liable for his medical expenses. While the Sullivan case was progressing, decisions were being rendered around the country addressing the issue of whether a Medicaid lien had to be paid prior to the establishment of a Supplemental Needs Trust (SNT).

On August 11, 1993, President Clinton had signed into law OBRA 1993 which included the new Trust provision for disabled

persons under 65. 42 U.S.C. § 1396p(d)(4)A). Congress provided that disabled persons, who needed to continue in the Medicaid program because of their inability to secure private health insurance or services to pay for their medical needs, could protect their assets by transferring the assets into an inter-vivos trust. Congress conditioned the use of these "payback" trusts for the disabled with the provision that upon the death of the trust beneficiary, the State would be reimbursed for an amount up to the total Medicaid provided to the Trust beneficiary from remaining trust assets. Each state was to enact companion legislation during its next legislative cycle.

On September 30, 1993, Department of Health and Human Services Director of the Medicaid Bureau Sally R. Richardson, on behalf of First Lady Clinton, responded to the plea of Patricia Callahan, the Guardian-mother of Frances Callahan, that her daughter Frances Callahan would receive no benefit from settling her tort action because the Medicaid lien was greater than the settlement. Director Richardson informed Guardian-mother Callahan of OBRA 1993 which would be effective on October 1, 1993. "To be non countable, the trust instrument must also provide that the State will receive any funds remaining in the trust after the person's death, up to the amount of Medicaid benefits paid on behalf of the person." A. 83. Emphasis Added. Appendix
B. The Callahan petition for a writ of certiorari is now pending. Index No. 99-80.

On December 30, 1993, Medicaid Director Sally Richardson wrote a letter to City of New York Medicaid counsel Howard Gibbs regarding the then pending Reyes case. Appendix C. Director Richardson clarified the federal government's interpretation of the new federal Trust statute. Reyes was a case in which the Medicaid lien was less than the tort settlement. Director Richardson addressed the issue of whether a "priority" or "allocation" standard should be used as to satisfaction of the Medicaid lien that had accrued prior to the transfer of assets into an OBRA 1993 Trust. Medicaid Director Richardson discussed the interplay between the Medicaid assignment statute, the

Medicaid anti-lien statute, and OBRA 1993:

> If, under State law, a lien is not being placed upon the Medicaid recipient's property, but rather is being placed upon the tortfeasor's (the defendant in the personal injury litigation) property or upon funds which are set aside to be used in a settlement of the litigation, but which have not become Ms. Reyes' property, then there would be no conflict with section 1917 (a) of the Act. This is because section 1917 (a) only precludes States from placing liens on an individual's property. It would appear that New York has an interest in the potential personal injury settlement, since Ms. Reyes' rights to recover payment for medical care must have been assigned to the State under Section 1912 of the Act in order for her to be eligible for Medicaid. In that event, if New York places a lien on those funds, it does not violate the Medicaid statute. However, it cannot impose a lien on any of Ms. Reyes property which has not been assigned to the State.

It appears that the State has some options in dealing with Ms. Crannage. It could, if permitted under State law, place a lien on the tortfeasor's property. It could agree with Ms. Crannage on a settlement of the tort action in which it gets an appropriate interest, or it could intervene in the case and represent its own interests directly." Emphasis Added. A 85.

On September 1, 1994, the State of New York's legislation implementing the federal OBRA 1993 statute became effective. The EPTL § 7-1.12 was amended and subsection (a)(5)(v) was added to provide for self-settled trusts with a payback to the State for an amount up to the total of all Medicaid expended upon the death of the SNT beneficiary. See In re Moretti, 606 N.Y.S. 2d 543 (Sup. Ct. Kings. Co. 1993).

On April 1, 1996, the Appellate Division rendered its decision in Cricchio v. Pennisi, 640 N.Y.S.2d 573 (App. Div. 2 Dept. 1996) and affirmed the trial judge's decision that Congress

intended that the repayment of the Medicaid lien is deferred until the SNT beneficiary's death. "[t]he satisfaction of a pre-existing Medicaid lien is not a precondition to the funding of a special needs trust." Id. at 578. The Appellate Division rendered the same decision in Link v. Smithtown Hospital, 640 N.Y.S. 2d 786 (App. Div. 2 Dept. 1996). The City Medicaid lienor appealed the Cricchio decision and the SCDSS Medicaid lienor appealed Link.

On June 5, 1996, Medicaid Director Sally Richardson issued a Memorandum to all Medicaid Directors regarding SNTs. A 48. Appendix D. This Memorandum, which would be later cited by the New York State Court of Appeals in its 1997 Cricchio decision at n. 6, explained the federal government's interpretation of OBRA 1993 and the interrelationship to the federal Medicaid assignment statute and the federal Medicaid anti-lien statute:

> "If State law permits, a State can place a lien upon a third party's property, as in a situation involving the property of a tortfeasor or defendant in a personal injury suit, or upon funds which are set aside to be used in a settlement, but which have not yet become the property of the Medicaid applicant or recipient." Emphasis Added.

The June 5, 1996 "Richardson" Memorandum was issued after SNT-Medicaid lien litigation had been percolating across the country for almost three years. As Secretary Shalala had not promulgated OBRA 1993 regulations, this Memorandum was issued to all 50 State Medicaid Directors regarding SNTs as a statement of the federal government's policy. The HCFA memo was consistent with HCFA letters, rejected the "priority" standard, and established a "portion" standard. Director Richardson explained the federal "portion" standard:

> Thus, if an individual is already Medicaid eligible at the time he or she receives a third party settlement or judgment, the State has claim to any portion of the proceeds which were intended to pay for medical care

for the individual that is covered by Medicaid." Id. at A 50.

Director Richardson further clarified the options of the Medicaid agency to protect its claim by accepting an "appropriate" share of the monies received by the plaintiff or representing its own interests directly against the defendant:

> To avoid the lien issue, but protect its rights, a state could come to an agreement with a plaintiff on the settlement of a tort action in order to get an appropriate share. Alternatively, the State could intervene in the case and represent its own interests directly. Since the individual has assigned to the State his or her rights to recover payment for medical care under section 1912, the State has an interest which it can represent directly." Emphasis Added. A 50.

On September 9, 1996, Acting HCFA Medicaid Director Steve Mc Adoo wrote a letter to a South Carolina attorney who had made an inquiry as to the federal position in a case in which the Medicaid lien is greater than the settlement. A 45. Appendix E. Acting Director Mc Adoo explained that the portion of a settlement that is intended to pay for prior medical expenses is to be paid to the Medicaid agency. "If an individual is Medicaid eligible at the time of a settlement or judgment, the State has claim to any portion of the proceeds that were intended to pay for medical care for that individual that is covered under Medicaid, and that the individual needs as the result of an injury caused by the tortfeasor." Emphasis Added.

On October 1, 1996, petitioner's counsel filed a Freedom of Information Act (FOIA) request seeking the release of the universe of documents upon which the "Mc Adoo" letter was based. On November 12, 1996, Health Care Financing Administration (HCFA) Deputy Chief Counsel Jaye advised that in is opinion Acting Director Mc Adoo's interpretation was an interpretative rule and thereby exempt from the rulemaking

requirements of 5 U.S.C. § 553. A. 88. On November 18, 1996, the requester appealed the FOIA denial.

All of the federal government's interpretations of OBRA 1993 had been in letter form because Secretary Shalala had not promulgated any regulations pursuant to the Administrative Procedure Act. Therefore, on November 12, 1996, Medicaid recipient Callahan petitioned Secretary Shalala to promulgate OBRA 1993 regulations. See 5 U.S.C. § 553(e) and Auer v. Robbins, 519 U.S. 452 (1997). Guardian-mother Callahan sought a regulation that tracked the words of the enabling statute that explicitly provided for the deferment of payment of the Medicaid lien that had accrued prior to establishment of the Supplemental Needs Trust until death. In the alternative, the petitioner requested that Secretary Shalala implement the Negotiated Rulemaking Act of 1990.

On January 6, 1997, Acting Director of the Medicaid Bureau Judith Moore advised petitioner's counsel that the Secretary would not be promulgating OBRA 1993 regulations to establish the standard to be applied in cases involving SNTs and Medicaid liens. "Nevertheless, we have considered your request to modify the interpretation to defer any payments to Medicaid until a disabled individual has died. In light of our analysis in the interpretation, we believe the position you have advocated would violate the statute." A 87.

Acting Director Moore also rejected the request for negotiated rule-making. "After carefully considering such variables as the enormous amount of time and resources that we believe this process would involve as well as the likelihood that the parties interested in this issue would ever reach a consensus, we have concluded that this issue is not an appropriate candidate for negotiated rulemaking." A 87.

On January 24, 1997, HCFA FOIA Officer Glenn Kendall denied the FOIA request seeking the universe of documents upon which the "Mc Adoo" letter was based on the grounds that the documents were predecisional documents. "Release of this material would be a deterrent to future free exchange of information within the agency if agency personnel have to fear the

public disclosure of their opinions, advice, analysis, and recommendations." A. 92.

In February, 1997, the Sullivan case was ready for trial. Plaintiff's tort counsel Roger Kunkis, Esq., recommended that because of complicated factual issues, that the plaintiff settle the case rather than risk a defendants' verdict from a Suffolk County jury. Based on that legal advice, the plaintiff instructed his counsel to negotiate a settlement of the case.

Plaintiff's counsel negotiated a settlement whereby the defendant County of Suffolk, a self insurer, would pay the plaintiff a gross $ 1,400,000 in full satisfaction of his claims against the defendants. After payment of attorney's fees and expenses, the plaintiff was to receive a net recovery of $922,000. An essential term of the agreement was that the net proceeds were to be paid into a Supplemental Needs Trust (SNT) pursuant to the 1993 federal statute, 42 U.S.C. § 1396p(d)(4)(A). This would allow the plaintiff to continue to receive the needed Medicaid benefits as intended by the Congress.

On February 26, 1997, the Suffolk County Department of Social Services (SCDSS) notified plaintiff's tort counsel that it claimed a lien against any lawsuit proceeds for Medicaid benefits provided.[1] SCDSS advised that as of that date, the County, State and federal governments had provided $555,959.26 of Medicaid benefits to Brian Sullivan. A 30.

All parties understood that pending before the New York

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[1] The parties acknowledged that there was an appearance of a conflict of interest because the Suffolk County of Department of Social Services (SCDSS) was represented by Paul Costello, Esq., the Medicaid Bureau Chief of the Suffolk County's Attorney's Office, and the defendant County of Suffolk was represented by trial counsel W. Scott Schneider of the same Suffolk County's Attorney's Office. However, the plaintiff waived any claim of a conflict of interest because it was agreed that Paul Costello, Esq. was representing the State and Federal Medicaid Programs as the lead Medicaid lienor agency and because of the integrity of Paul Costello, Esq. who had created a "Chinese wall" within the Suffolk County's Attorney Office between Mr. Schneider and Mr. Costello. See Plaintiff's July 27, 1997 Affidavit at ¶ 8. A. 14.

State Court of Appeals was the appeal of the New York State Appellate Divisions' decisions in Cricchio and Link in which the Appellate Division had affirmed the trial courts' decisions that Congress intended that a Medicaid lien payment be deferred until the death of a Supplemental Needs Trust beneficiary.

On March 11, 1997, plaintiff's counsel sent a proposed order settling this action with a draft supplemental needs trust. Based on the Appellate Division Cricchio decision, the proposed order included a provision that the Medicaid lien would be deferred until the death of the SNT beneficiary. The SCDSS did not object to the establishment of an SNT, but refused to agree to defer the payback of the Medicaid lien until the plaintiff's death.

On March 25, 1997, the New York State Court of Appeals reversed the Appellate Division Cricchio and Link decisions and remitted the cases to the trial courts for an allocation hearing to satisfy the Medicaid lien prior to the transfer of the settlement into a SNT. "Accordingly on remittal, the courts must allocate that portion of the recovery that is intended to compensate each plaintiff for past medical expenses and from that amount determine the sum owed to the public welfare official to satisfy the lien." Slip opinion at 14. A. 23. Emphasis supplied.

The New York State Court of Appeals' Cricchio decision impacted on the settlement negotiations because of its "allocation" holding. "The defendants' willingness to agree to the trust then changed in light of the March 25, 1997 decision of the New York State Court of Appeals in Cricchio v. Pennisi." Sullivan, 1 F.Supp. 2d at 186.

On April 18, 1997, in Cricchio, the City of New York Medicaid lienor filed a Motion with the Court of Appeals seeking a clarification of the Cricchio remittitur and argued that an "allocation" standard was contrary to federal law. A. 53. On April 29, 1997, the SCDSS Medicaid lienor in Link, filed a Motion with the Court of Appeals seeking a clarification of the Link remittitur and argued that an "allocation" standard was contrary to federal law. A. 74.

On May 13, 1997, as the New York State Court of Appeals had remitted the Cricchio and Link cases to the trial courts for an

allocation determination, and as the Sullivan case was scheduled for trial, the parties agreed that the case should be settled for the $1, 400,000. The parties agreed that the legal issue of whether the Medicaid lien should be deferred until death would be submitted to the District Court Judge for her decision. Sullivan Stipulation Regarding Medicaid Lien. A 10-12. Appendix F. It was agreed that if the Court ruled in favor of SCDSS on the Medicaid lien issue, then there would be a cap of $200,000 to be presently paid to SCDSS in partial satisfaction of the Medicaid lien. Sullivan Stipulation ¶¶ 1, 4-7.

It was also agreed that in order to settle the case that the defendants would pay the full $1,400,000 to the plaintiff. "Payment by defendant to plaintiff shall be made within six (6) weeks. The payment shall be made to plaintiff's attorney, Roger Kunkis, Esq., to be placed in an interest bearing escrow account." Sullivan Stipulation ¶ 2. Emphasis Added.

On July 1, 1999, the New York State Court of Appeals granted the Medicaid Lienors' Cricchio and Link Motions and amended its March 25, 1997 Cricchio-Link decision. The Court replaced its original Cricchio-Link "allocation" holding with a remittitur decision that reserved for the trial courts the authority to determine what legal standard to apply in satisfying the lien. "Given that the parties did not present any arguments to this Court concerning whether the entire amount of the personal injury settlement or only that portion attributable to past medical expense is available to satisfy the lien, we do not pass on the question, which must be addressed in the first instance by the court on remittal." Cricchio, 90 N.Y.2d at 684. A. 26.

On October 31, 1997, Department of Health Records Access Officer James O' Meara responded to a New York State Freedom of Information Law (FOIL) request for the documents which reveal the standards upon which local Medicaid agency subrogation claims were based. Mr. O' Meara advised that there were no documents. "Therefore, there are no written standards or documents provided to local agencies on the subject."

On December 26, 1997, based on the New York State Court of Appeals' Cricchio and Link remittiturs, the Link trial court

determined that the Medicaid lien must be satisfied prior to the establishment of the SNT. Link II v. Smithtown, 670 N.Y.S. 692 (1997). On April 30, 1998, citing to Cricchio and Link II, Judge Seybert rendered her Sullivan v. County of Suffolk decision and held that the Medicaid lien must be paid back prior to the establishment of the SNT. On April 6, 1999, the New York State Court of Appeals rendered its Calvanese v. Calvanese-Callahan decision and held that the Medicaid lien must be paid back prior to the establishment of the SNT without an allocation determination. On April 23, 1999, the Second Circuit affirmed Judge Seybert's Sullivan decision and adopted the New York State Court of Appeals Calvanese-Callahan holding, including its priority standard for satisfaction of a Medicaid lien. 174 F.3d 282 (2d Cir. 1999) at n.5. Appendix A.

REASONS FOR GRANTING THE WRIT

Congress intended that Medicaid recipients establish inter vivos trusts with tort proceeds to pay for items of need not paid for by the Medicaid program. 42 U.S.C. § 1396p(d)(4)(A). Congress intended that a public-private partnership develop to meet the lifetime needs of a disabled population that could not cure its poverty by employment. However, in Sullivan that remedial Congressional purpose has been thwarted because of the Second Circuit's approval of the State's application of its State lien statute whereby the Medicaid lien is paid by the Medicaid recipient contrary to the federal Medicaid anti-lien statute.

Over five years have now passed since President Clinton signed into law the Medicaid "payback" trust statute. The Secretary of HHS has not promulgated any regulations to implement this remedial statute. As a result, each state is making its own interpretation of the intent of Congress, sometimes consistent with HCFA Director Richardson's own interpretation of OBRA 1993 and sometimes, as in this case, contrary to the HCFA interpretation. If this Court grants the petition, the Court can review the 1993 remedial trust statute within the context of the complicated federal-state Medicaid scheme and determine

whether Congress intended that Medicaid recipients pay Medicaid liens prior to their deaths or whether reimbursement for Medicaid is deferred until the death of a trust beneficiary.

This case has national importance because Congress intended that the same federal anti-lien, assignment, and payback trust statutes apply in all 50 States. If the decision is not reversed, then there is a likelihood that states will model their own state lien statutes after New York State Social Services Law § 104-b in order to recover tort proceeds from the vulnerable Medicaid plaintiffs, rather than directly from the wrongdoing defendants. See Norwest Bank of North Dakota v. Doth, 159 F. 3d 328 (8th Cir. 1998) and the State of Minnesota's reference to the New York State lien law. See Wallace v. Jackson, State of Utah, Mc Neil et. al., 972 P. 2d 446 (Utah 1998) and the State of Utah's reference to the New York State lien law. See also the pending petition for a writ of certiorari, Mc Neil v. State of Utah, Medicaid Section, in which petitioner Mc Neil is making the same federal arguments as petitioner Sullivan and petitioner Callahan. Index No. 98-1729. However, the Court should also note the April 27, 1999 holding of the Indiana Court of Appeals which did not follow the New York State Court of Appeals holding that a Medicaid lien had a priority status. In re Wade, 711 N.E.2d 851, 1999 WL 244255 (Ind. App.)

Because there have been no federal OBRA 1993 regulations, courts around the country have rendered decisions that apply one of three standards:

A) Total deferral of the lien until death This standard provides that the prior Medicaid lien should be deferred until the death of the Trust beneficiary. This was the standard that the New York Court of Appeals rejected when it rendered its Cricchio v. Pennisi, 90 N.Y.2d 296 (1997) decision and reversed the Appellate Division's decision in Cricchio v. Pennisi, 640 N.Y.S. 2d 573 (Ap. Div. 2 Dept 1996). This is the standard that the petitioner argues Congress intended that all of the States apply.

B) Allocation of the lien This standard would provide the trial court with the authority to make a determination as to how much of the net settlement, if any, is to be allocated to pay for

past medical expenditures and how much of the net settlement is to be allocated for the plaintiff's pain and suffering, economic loss, and future needs. Only that portion allocated for past medical expenditures would be available for defendant to pay the Medicaid agency in order to satisfy a Medicaid lien. This was the New York State Court of Appeals March 25, 1997 Cricchio standard until the Court rendered its July 1, 1997 decision which recalled the "allocation" sentence from its original Cricchio decision. This is the standard that is found in the "Richardson" memo and the "Mc Adoo" letter whereby the "portion of the proceeds" that is intended to pay for prior medical expenses are to be paid by the defendants directly to the Medicaid agencies. This is the standard the Indiana Court of Appeals established in Wade, supra.

C) Priority lien of Medicaid. This standard provides that the Medicaid lien is a priority that must be paid prior to payment for any of the other elements of a net tort settlement and prior to the establishment of an OBRA 1993 inter vivos trust fund. This is the standard that the New York State Court of Appeals established Calvanese v. Calvanese-Callahan decision. Petitioner argues that this standard violates the federal anti-lien and assignment statutes because Congress intended that the Medicaid Lienor recover from the defendants, not the plaintiffs.

Sullivan provides the Court with an opportunity to clarify the interrelationship between the Medicaid anti-lien state and the new Medicaid "payback" trust statute as applied in all 50 States. Sullivan provides the Court with an opportunity to decide whether the Medicaid agency has a statutory duty under the assignment statute to sue the defendants directly to recover medical expenses from the defendants, rather than from the plaintiffs. Petitioner Sullivan argues that the benign 1993 Congress, which enacted a remedial statute that allows a Medicaid recipient to preserve proceeds of a tort action by establishing an inter vivos trust, could never have intended the result that the Medicaid agency collects from the plaintiff and not from the defendants.

Thus, Sullivan presents an important public policy issue for

the Court to review. Application of the present Sullivan standard will deter plaintiffs in all 50 States with Medicaid liens from ever entering into settlements of their cases. Rather, the plaintiffs will litigate their actions and risk defendants' verdicts rather than agree to settlements that will pay for attorneys' fees and the Medicaid liens with the meager remains paid to the plaintiffs. Defendants' verdicts will result in no satisfaction of Medicaid liens and no Supplemental Needs Trusts with paybacks to the State upon the death of the beneficiary. The public coffers will suffer. Only third party defendants, whose legal liabilities have not been proven at trial, will benefit from the Sullivan legal standard. Therefore, the petitioner makes the following points in support of this petition:

POINT I
NEW YORK STATE'S LIEN LAW AS APPLIED VIOLATES THE SUPREMACY CLAUSE BECAUSE CONGRESS INTENDED THAT NO LIEN BE IMPOSED ON A MEDICAID RECIPIENT'S PROPERTY DURING LIFETIME

This Court should grant the petition because the Second Circuit's Sullivan decision, which adopted the New York State Court of Appeals Calvanese v. Calvanese-Callahan decision, affirmed the Medicaid agency's application of the New York State lien statute and thereby violated the Supremacy Clause, United States Constitution, Article VI, Clause 2. The Congress could not have been clearer when it enacted the anti-lien provision. "No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan..." 42 U.S.C. § 1396p(a)(1). Notwithstanding that clear prohibition, New York State's Social Services Law § 104-b is being applied whereby liens are being collected from Medicaid recipients' property.

The Sullivan facts reveal that the State of New York has flaunted the federal Medicaid anti-lien statute. The Second Circuit has ratified the State agency's use of the State lien law in a Medicaid case because the assets passed from the defendants

to the plaintiff upon settlement of the underlying tort action. Because of the decisions below, the Medicaid lien has been collected from the plaintiffs' property, not the defendants. Thus, in violation of the Supremacy Clause, the Second Circuit has ratified the State's use of its State lien law and has determined that the State of New York is not bound by the federal Medicaid anti-lien statute.

Sullivan is not a "federalism" case because the plaintiff did not sue the State. See Aiden v. Maine, __ U.S. __ (1999). Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, __ U.S. ___ (1999). College Savings Banks v. Florida Prepaid Postsecondary Education Expense Board, __ U.S. ___ (1999). Quite the contrary, it is the State Medicaid agency's delegatee which is in effect suing the plaintiff by its use of a State Medicaid lien in direct contradiction to the federal Medicaid anti-lien statute.

Hence the need for the Court to nip in the bud any application of this Court's recent federalism decisions that may foster a State's belief that the federalism decisions are a license for the States to defy a clear federal statutory mandate. This is especially the case when Congress provided the States with a remedy to recover Medicaid expenditures by complying with the federal assignment statute by suing the defendants directly. See POINT III, infra.

The Second Circuit has adopted the New York State Court of Appeals' legal fiction that plaintiff Sullivan was holding the State's funds. The Second Circuit simply did not discuss the statutory requirement that requires that the State Medicaid Plan must comply with the federal anti-lien law in order for the State to receive federal Medicaid funds. See 42 U.S.C. § 1396a (a)(18). Thus, the Second Circuit's adoption of the New York State Court of Appeals' constructive trust theory is the result of the Second Circuit's own legal blindness to the Medicaid anti-lien statute when it adopted the New York State Court of Appeals' myopic view that OBRA 1993 was an eligibility provision unrelated to the federal anti-lien statute:

We reject appellant's arguments for essentially the same

> reasons that the district court and the New York Court of Appeals set forth. Section 1396p(d) concerns the Medicaid eligibility of a supplemental needs trust beneficiary. The statue does not alter the assignment and subrogation scheme, and it therefore does not affect the state's right to satisfy its lien. Id. at 285.

The New York State Court of Appeals' decision was grounded on the New York State's public assistance lien law, N.Y. Soc. Serv. L. § 104-b, which was enacted prior to the enactment of the federal Medicaid statute. The Second Circuit has now backed itself into the same historical corner as the New York State Court of Appeals from which the State Court of Appeals' only escape was to create the present constructive trust fiction standard. The State Court of Appeals issued an Alice-in-Wonderland interpretation of the federal statutory Medicaid mandates by adding the State's lien law to the federal assignment statute, and then by subtracting the federal anti-lien statute, as if the anti-lien statute had never been enacted by the Congress.

Petitioner most respectfully submits that no matter what contorted legal reasoning is used, the indisputable fact is the State is placing liens on Medicaid recipients' property. Indeed, the Medicaid lienor does not deny that fact the Medicaid lien that has been enforced against the plaintiff's monies paid by the defendants to settle the plaintiff's case because the Medicaid lienor never exercised its federal assignment duty to sue the defendants directly.

The Cricchio constructive trust analysis allows the State's "purely procedural" 104-b lien to take precedence not only over the federal Medicaid anti-lien statute, but also over the federal assignment statute. See, e.g. Baker v. Sterling, 39 N.Y.2d 397 (1986). Thus, the Supremacy Clause again comes into play because the Congress could not have been clearer in establishing the assignment duty of the State to pursue legally liable third parties, not the plaintiffs. 42 U.S.C. § 1396a(a)(25)(I). See POINT III.

In summary, petitioner Sullivan argues that based on the

Supremacy Clause, the Second Circuit should not be allowed to simply ignore the federal anti-lien statute and ratify the State's use of a constructive trust fiction as if the Congress never enacted the federal anti-lien statute. Therefore, this Court should grant the petition and address petitioner's argument that the Supremacy Clause of the Constitution protects Brian Sullivan's settlement proceeds because the Congress explicitly enacted a statute that prohibited the State from placing a lien on petitioner's property.

POINT II
BY APPLICATION OF THE SUPREME COURT'S "LITERAL TEXT" STATUTORY INTERPRETATION STANDARD, THE CONGRESS INTENDED THAT THE "TOTAL" MEDICAID LIEN BE PAID UPON DEATH OF THE TRUST BENEFICIARY

The petitioner argues that this Court need not reach the Constitutional issue if the Court grants the petition and applies its own "literal text" standard to the enabling federal statute. The petitioner argues that if words mean what they say, then the Congress intended that the "total" Medicaid be paid back at the time of the death of the Trust beneficiary, and not before.

On August 11, 1993, the federal law authorized the disabled under the age of 65 to establish trust funds with their own assets such that these trusts would not be considered available resources in computing eligibility for Medicaid. 42 U.S.C. § 1396p(d)(4)(A). The Congress required that there is to be a pay back of the "total" Medicaid received during the lifetime of the Trust beneficiary only upon the death of the trust beneficiary.

Petitioner argues that this statute, clear on its face, requires that payments of any Medicaid lien should be deferred until the death of the beneficiary of a SNT. At that time, an amount not to exceed the total Medicaid provided is to be paid back. The language of this remedial statute did not provide for total reimbursement prior to the establishment of a trust and then again for the total reimbursement after death.

This Court has determined that when the Judiciary interprets a statute, it is to apply a "literal text" standard. It is the Legislative

Branch of Government that establishes the standards which the Executive Branch is to apply, not the Judiciary. Hence, the Court must interpret the words of a statute by applying the literal textual meaning of the words.

In Brogan v. United States, 522 U.S. 398 (1998), Justice Scalia used the "literal text" standard in interpreting a federal statute. The issue before the Court was whether the use of an exculpatory "no" answer was embraced within a statute, 18 U.S.C. § 1001, by which "any" false statement "of whatever kind" was a violation of the statute. The Court found that the literal text of the statute required that it applied to all false statements.

The Court applied the "literal text" standard and cited to the Webster's New International Dictionary and quoted the definition of "no". The Court explicitly rejected the argument that the Court should depart from a literal text of the statute enacted by the Congress. Justice Scalia explained that the Judiciary should not usurp Congress' duty to establish standards. The Judiciary must not adopt interpretations of the law established by Circuit Courts rather than by the Congress:

> In sum, we find nothing to support the "exculpatory no" doctrine except that many Court of Appeals decisions that have embraced it. While *communis error facit jus* may be a sadly accurate description of reality, it is not the normative basis of this Court's jurisprudence. Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread. Id. at 809. Emphasis Added.

The Brogan "literal text" standard is an emphatic extension of the Chevron doctrine. "If the intent of Congress is clear, that is the end of the matter." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984).

The appellant argues that the Second Circuit should have applied the "literal text" standard in Sullivan. If there had been any confusion as to the meaning of the Congressional use of the

word "total", then the Second Circuit should have applied the dictionary definition. As per Brogan, a Court should not redefine the word "total" to establish a policy standard not found in the literal text of the statute.

By applying the "literal text" standard to the federal OBRA 1993 Trust statute, Congress intended that reimbursement to the State for medical assistance be only upon the death of the Medicaid recipient. At that time, reimbursement will be made for an amount not to exceed the total medical assistance received during the lifetime of the disabled beneficiary.

The word "death" has its plain unmistakable meaning. The word "total" also has its plain unmistakable meaning. "Whole, not divided, lacking no part, entire, full, complete, the whole amount. Utter, absolute." Black's Law Dictionary (5th ed. 1979).

Thus, by application of the Brogan "literal text" standard, the appellant argues that Congress intended that recovery of the Medicaid provided both prior to the establishment of the Trust and the Medicaid provided after the establishment of the Trust is to be deferred until death. These are the two parts of the "total" Medicaid that is to be recovered upon death.

The federal statute does not provide for any reimbursement to the State prior to the creation of the trust fund. Indeed, if reimbursement is made for Medicaid provided prior to the creation of the trust fund, then it becomes a mathematical impossibility to reimburse the State for the total lifetime of medical assistance again upon the death of the beneficiary. Hence, the "literal text" of the statute requires that a total lifetime of medical assistance be reimbursed only once and that "payback" is at the death of the Trust beneficiary. Pursuant to Brogan, this Court should follow the standard established by the Congress and not the standard established by the New York State Court of Appeals.

The Brogan test amplified the Second Circuit's statutory interpretation test of using dictionary definitions of statutory words to interpret the federal Medicaid statute. In Greenery Rehabilitation Group v. Hammon, 150 F. 3d 226 (2d Cir. 1998), the Second Circuit reversed the trial Court's interpretation of a

Medicaid statute that provided Medicaid benefits to undocumented aliens who were suffering from "emergency medical conditions". The Court interpreted the statutory definition of an "emergency medical condition" provided in 42 U.S.C. § 1396b(v)(3), based on its reading of the Webster's definition of an "emergency" which conveyed the "commonly understood definition" of the word emergency. The Court then reviewed the dictionary definition of the word "acute" and "immediate" in interpreting the statute. "In sum, the statutory language unambiguously conveys the meaning that emergency medical conditions are sudden, severe and short-physical injuries or illnesses that require immediate treatment to prevent further harm." Id. at. 231.

In Luyando v. Grinker, 8 F. 3d 948 (2d Cir. 1993), the Second Circuit did not use a dictionary definition test, but applied the Chevron standards of deferring to the federal agency's interpretation, and reversed the trial judge. "But, while we can easily see how the Secretary might have reasonably chosen to interpret the statute to permit pass throughs for months in which payments were not received in order to mitigate hardship, we cannot say that such interpretation was compelled or the Secretary's contrary interpretation as embodied in § 302.51 (b)(1) was an impermissible, and hence invalid, construction of the statute." Id. at 952.

Should this Court find the literal text analysis inapplicable, the Court may apply the second prong of the Chevron test absent duly promulgated regulations. The Court could then rely upon the "Richardson" and "Mc Adoo" letter interpretations of the remedial trust statute. These federal officials did not take the position of the New York State Court of Appeals that the entire lien must be paid as a priority. Rather, the prior medical expenses would be paid only from that portion of the settlement proceeds that were intended to pay for past medical expenses. See Appendices B, C, D, and E.

In summary, this Court should grant the petition and apply the Brogan "literal text" standard when it interprets the intent of Congress. 42 U.S.C. § 1396p(d)(4)(A) authorized disabled

individuals to establish trusts so long as upon their death, the trust would pay back the state for an amount not to exceed the Medicaid total benefits expended during lifetime. If deferral of any lien was not the intent of Congress, then as per Brogan, it is for Congress, not the New York State Court of Appeals, to change the statute.

POINT III
THE BROGAN STANDARD SHOULD BE APPLIED TO THE FEDERAL ASSIGNMENT STATUTE THAT REQUIRES THE MEDICAID AGENCIES TO SUE THE DEFENDANTS, NOT THE PLAINTIFFS, IN ORDER TO RECOVER PAST MEDICAL EXPENSES.

The federal assignment statute explicitly authorizes the Medicaid agencies to directly pursue third parties to recover Medicaid expenditures. By applying the Brogan "literal text" standard to the federal assignment statute, the Congress could not have been clearer in establishing that the Medicaid agencies' fulfill their federal statutory assignment duties by recovering medical expenses from the defendants, not the plaintiffs.

The federal assignment statute is a collection statute and not a lien statute. Congress intended that the State Medicaid agencies act upon the Medicaid recipients' assignments of their causes of actions and sue defendants determined to be liable for medicaid expenditures. 42 U.S.C. § 1396k. The petitioner makes the same Brogan "literal text" argument to the federal assignment statute that is made to the OBRA 1993 Trust statute. By ignoring the "literal text" of the federal assignment statute, the Second Circuit ratified the Medicaid agency's fateful decision not to sue the defendants directly based on Brian Sullivan assigning his cause of action for medical expenses to the Medicaid agency.

A. The Federal Assignment and Collection statutes

The legislative history of the Medicaid assignment statute, 42 U.S.C. § 1396k, supports the petitioner's argument that Congress

intended that the Medicaid agencies pursue a 100% recovery of their claims against third parties legally liable to provide for medical care borne by the Medicaid program by filing independent causes of action against the defendants. In 1986 Congress added subdivision (a)(1)(C) to Section 1396k, which provides that a Medicaid recipient is required only to assist the Medicaid agency: "(T)o cooperate with the State in identifying and providing information to assist the State in pursuing any third party who may be liable to pay for care and services available under the plan." Emphasis Added. Id.

In adopting this provision, Congress determined that it intended that the states, not the Medicaid recipients, pursue legally liable third parties. Medicaid recipients were not required to prosecute on behalf of the state, but merely to assist with the State in its pursuit of third party resources:

> The conference agreement follows the Senate amendment with a modification clarifying that individuals are required to identify to the extent they are able, potentially liable insurers and other third parties, and to provide information to assist the States in pursuing the collections (of third party reimbursement) themselves. Pursuit is the responsibility of the provider or the State as provided elsewhere in this section. Consolidated Omnibus Budget Reconciliation Act of 1985, H.R. Conf. Rep. No. 453, at 544-45. Emphasis Added.

In neither Sullivan nor Calvanese-Callahan, did the Courts discuss the federal statutory duty of the Medicaid agencies to pursue the defendants, not the plaintiffs, in order to collect monies to reimburse the Medicaid agencies for past medical expenses. As with the federal Medicaid anti-lien statute, this provision of the complicated federal-state Medicaid program was simply ignored by Second Circuit because it ran counter to the State public assistance lien statute.

The Secretary of Health and Human Services' own duly

promulgated assignment regulations clarify the mandate that the agency pursue recovery directly against the tortfeasor or other legally liable third party. First, the regulations establish the Medicaid recipient's duty to identify and provide information to the Medicaid agency which had the duty to pursue the potentially liable third party. 42 C.F.R. § 433.137 (b) (1) provides that:

> A state plan must provide that ....(t)he requirements of §§ 433.145 through 433.148 are met for assignment rights to benefits... and cooperation in identifying and providing information to assist the State in pursuing any liable third parties. Emphasis Added.

The Medicaid recipient's cooperation duties do not include a duty to prosecute independently the third party on the state's behalf. Rather the Medicaid recipient's duty is to cooperate with the Medicaid agency and the Secretary prescribed the cooperation standard duties of the Medicaid recipient by the duly promulgated HHS regulations:

> B). Essentials of cooperation. As part of cooperation, the agency may require an individual to:
>
> 1) Appear at a State or local office designated by the agency to provide information or evidence relevant to the case;
>
> 2) Appear as a witness at a court or other proceeding;
>
> 3) Provide information, or attest to lack of information, under penalty of perjury;
>
> 4). Pay to the agency any support or medical care funds received that are covered by the assignment of rights;
>
> 5) Take any other reasonable steps to assist in establishing a paternity and securing medical support

> and payments, and in identifying and providing information to assist the state in pursuing any liable third party. 42 C.F.R. 433.137 (b).

The assignment regulatory scheme also establishes standards upon which the State is to make its decision whether to pursue its assignment right against a liable third party. 42 CFR § 433.139 (d)(3) provides that "(r)eimbursement must be sought unless the agency determines that recovery would not be cost effective in accordance with paragraph (f) of this section." Paragraph (f) establishes standards for when the State agencies are to secure reimbursement:

> 1) An agency must seek reimbursement from a liable third party on all claims for which it determines that the amount it reasonably expects to recover will be greater than the cost of recovery. Recovery efforts may be suspended or terminated only if they are not cost effective.
>
> 2). The State Plan must specify the threshold amount or other guideline that the agency uses in determining whether to seek recovery from a liable third party, or describe the process by which the agency determines that seeking recovery of reimbursement would not be cost effective.
>
> 3. The State plan must also specify the dollar amount or the period of time for which it will accumulate billings with respect to a particular liable third party in making the decision whether to seek recovery of reimbursement. Emphasis Added. Id.

Thus, pursuant to the Secretary's federal assignment regulations, SCDSS, on behalf of the State DSS and the federal government, had a duty to weigh all factors to determine whether it was cost effective to sue the defendants. In this case, the

Medicaid agency determined not to initiate an independent cause of action against the defendants to recover medical expenses that had been paid by the Medicaid program.

In Wade, the Indiana Court of Appeals rejected the Medicaid agency's preemption analysis by analyzing the federal assignment statute. 42 U.S.C. § 1396k(a)(1)(A). "Although the Medicaid lien statute provides a vehicle for FSSA to comply with federal law, we read the Medicaid statute not as mandating full recovery, but as obtaining so much of a reimbursement as the State can 'reasonably expect to recover.' 42 U.S.C. § 1396(a)(25)(B)." Emphasis Added. Wade, at 855.

Ironically, when the State complies with the assignment statute and sues defendants on behalf of Medicaid recipients, the State can be spectacularly successful. In State of New York v. Morris, 686 N.Y.S. 2d 564, aff'd, ___ N.Y.S. 2d___ (App. Div. 2 Dept. 1999), NYLJ, 6-19-99, State of New York recovered 25 billion dollars from the tobacco company defendants with Medicaid assigned causes of action. The State of New York secured this recovery because they performed the statutory duty that Congress intended that they perform: sue the defendants.

Indeed, the tobacco assignment suit has been so successful that there is now a dispute as to the share of the recovery the States will return to the federal government. See U.S. Wants a Cut of Tobacco Settlements: Administration Seeks Medicaid Repayments From State Lawsuits, N.Y.Times 11-19-97. The States, emboldened by their success, are arguing that they are not bound by the federal assignment statute such that the States will return to the federal government the federal government's share of the Medical expenses recovered from the defendants. If the "literal test" standard is applied to the assignment statute, then there will a surfeit of federal monies that the State could use to seed the local Medicaid lienor agencies with sufficient funds to staff suits against other tortfeasors who have caused federal Medicaid expenditures. If the 25 billion dollars are allocated to properly fund the local Medicaid agencies third party recovery unites, then the State can abandon its present policy and practice to place liens on Medicaid recipients' funds in mocking defiance

of the federal anti-lien statute.

B. The difference between an assignment and the use of a lien based on a subrogation theory

The Medicaid lienor's defense of its lien placed on the monies already received by the plaintiff highlights the critical distinction between assignment and subrogation. An assignment creates an immediate transfer of interest in the property. The agency can not put a lien on the property that it already owns.

In contrast, by subrogation, a lien may be imposed as a charge upon the property owned by another. See Springer v. J.R. Clark Co. 138 F. 2d 722 (8th Cir. 1943). The agency can put a lien on its own property only if that property is in the custody of a third party. However, pursuant to the Medicaid anti-lien statute, it cannot put a lien on the property of a Medicaid recipient as long as Medicaid was correctly provided. 42 U.S.C. § 1396 p(b)(1).

The statutory assignment under section 1396k results in the entire transfer of the assignor-Medicaid recipient's interest in the property to the assignee-Medicaid agency. In Broadcast Music, Inc. v. Hirsch, 104 F. 3d 1163 (9th Cir. 1997), the Ninth Circuit interpreted New York law and provided a definition of what an assignment constitutes: 1) a complete transfer of control over the property, 2) leaving the assignor no authority to collect, and 3) no power to revoke the transfer.

Petitioner Sullivan assigned to the Medicaid agency his legal right to recover medical expenses from the defendants. That assignment became the Medicaid agency's cause of action, and not Brian's cause of action. Brian Sullivan never relinquished his own right to recover from the defendants an amount of monies to pay for his pain and suffering, loss of future earnings, and future needs. Thus, when in 1997 monies were paid by the defendants to plaintiff, these were Brian's monies to pay for his undeniable pain and suffering and his catastrophic economic loss.

C. The deferral of the "payback" until death is not a windfall to the OBRA trust beneficiary.

In OBRA 1993, Congress did not provide a windfall for the

under 65 disabled Medicaid recipient. A special rule applies to the disabled person's OBRA 1993 Trust. The general Medicaid lien statute limits estate recovery only for Medicaid provided after the age of 55. No recovery is allowed for Medicaid provided prior to the age of 55. 42 U.S.C. § 1396p(b)(1)(B); N.Y. Soc. Serv. Law § 369(2)(b)(1)(B).

In contrast, to the general estate recovery rule, Congress created an exception for 1993 disabled beneficiaries of OBRA 1993 Trusts. Upon the death of the beneficiary, the state will be paid back for Medical assistance even if provided prior to age 55 and even if the source of the trust's funds is not causally related to an injury causing Medicaid benefits. Such total reimbursement is directed even if the assets placed into the trust fund are inherited moneys or moneys gifted outright to a disabled individual. See 42 U.S.C. § 1396p(d)(4)(A) and N.Y. Soc. Serv. L. § 366(2)(b)(2)(iii)(A).

D. The deferral until death of recovery of the lien is harmonious with the Medicaid enabling statute as it expands the agency's right of recovery.

Federal law mandates that each state comply with the provisions of the Social Security Act with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trust funds. 42 U.S.C. § 1396a(a)(18). Deferring reimbursement to the government until the death of the disabled tort victim does not in any way abrogate the State's responsibility and ability to pursue third parties liable to pay for medical treatment previously paid by Medicaid. Pursuant to statute, such legally liable third parties include health insurers, group health plans, service benefit plans, and health maintenance organizations. 42 U.S.C. § 1396a(a)(25)(A). These arguably include tortfeasors only who have been found legally liable to have caused the injury that necessitated the medical treatment paid by the Medicaid program. Thus, the provision whereby the total Medicaid lien is deferred until death is harmonious with the duty of the State Medicaid agencies to independently pursue third parties liable for medical expenses.

In Sullivan, plaintiff settled the case without any finding of liability of the defendants. The decision of the State not to pursue the defendants to recover medical expenses on its own assigned cause of action was the decision of the Medicaid lienor, not Brian Sullivan.

Thus, the State's duty to pursue third parties liable for the payment of medical expenses remains unaltered by the "payback" trust legislation. The establishment of the trust fund alters only the timing of the reimbursement, not the duty. The federal assignment statute is harmonious with the "payback" trust statute. Indeed, the federal statute eases recovery for the government, as the State need not pursue these third parties itself, as the Trustee must notify the State upon the death of the beneficiary and make reimbursement directly to the State.

The State's residuary interests in the SNTs are also not at risk if the State enforces the State's own statute. When enacting the OBRA 1993 compliance State statute, the New York State Legislature provided legal standing to the Medicaid agency to sue a Trustee who violates the terms of the Trust. Executive Law § 63. The duty of the Medicaid agency to sue the Trustee if the residuary interest is at risk is unmistakably clear. 18 NYCRR 360-4.5 (b)(5)(iv). There are also explicit standards controlling the Trustee's distribution of any Trust funds. 18 NYCRR 360-4.5 (b)(5)(iii). Thus, the standards upon which to determine whether the Trustee has breached his fiduciary duty to the State's residuary claim are clearly established.

In summary, the petitioner argues that the New York State Court of Appeals erred by not applying the "literal text" standard to the federal assignment statute. The petitioner respectfully submits that if this court applies the "literal text" standard to the assignment statute, it should conclude that the deference until death standard is the standard that Congress intended because the agency has its own remedy to secure 100 % of its medical expenses by suing the defendants directly.

CONCLUSION

The Sullivan decision violated the Supremacy Clause by ratifying the State's decision to violate the federal anti-lien statute. The literal text of the federal "payback" trust and assignment statutes does not support the conclusion reached by the Second Circuit.

For the above stated reasons, the petition for a writ of certiorari should be granted.

CHARLES ROBERT, ESQ.

APPENDIX A

174 F.3d 282, *; 1999 U.S. App. LEXIS 8006, **

BRIAN SULLIVAN, Plaintiff-Appellant, v. COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT, JOHN CAHILL and RENEE BUSCHOR,

Defendants,

SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES,

Lienor-Appellee.

Docket No. 98-7816

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

174 F.3d 282; 1999 U.S. App. LEXIS 8006

January 20, 1999, Argued April 23, 1999, Decided

PRIOR HISTORY: [**1] Appeal from Memorandum and Order of the United States District Court for the Eastern District of New York (Joanna Seybert, Judge) holding that county department of social services could satisfy Medicaid lien from shooting victim's settlement proceeds before he used funds to establish a supplemental needs trust. Appellant contends that the plain language of 42 U.S.C. § 1396p authorizes lien payment to be deferred until his death, when department of social services will be reimbursed for the total Medicaid assistance provided during appellant's lifetime.

DISPOSITION: Affirmed.

CORE TERMS: medicaid, settlement, supplemental, medical assistance, recipient, eligibility, third party, reimbursement, trust

beneficiary, medical care, satisfaction, federal law, reimbursed, assigned, assign, subrogation, escrow, condition of eligibility, establishment, lifetime, lawsuit, defer, legal capacity, parties agreed, tortfeasor, recoupment, ordering, execute, dies

COUNSEL: CHARLES ROBERT, Robert, Lerner & Robert, Rockville Centre, NY, for Plaintiff-Appellant.

PAUL COSTELLO, Suffolk County Attorney, for Lienor-Appellee.

JUDGES: Before: LEVAL and POOLER, Circuit Judges and CURTIN, District Judge. *

* The Honorable John T. Curtin, of the United States District Court for the Western District of New York, sitting by designation.

OPINIONBY: POOLER

OPINION:

[*283] POOLER, Circuit Judge:

This appeal requires us to decide whether a Medicaid benefits recipient must satisfy a Medicaid lien before he establishes a supplemental needs trust for his own benefit. Brian Sullivan appeals [**2] from the decision of the United States District Court for the Eastern District of New York (Seybert, J.) ordering that he use the proceeds of his tort settlement to satisfy a $ 200,000 Suffolk County Department of Social Services ("DSS") lien before he established a supplemental needs trust.[1] Sullivan argues that he may transfer all of the settlement proceeds to a trust

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[1]At the time of the tort settlement, DSS held a Medicaid lien in the amount of $ 555,959.26. Subsequently, the parties and DSS stipulated to reduce the lien to $ 200,000.

because DSS will be reimbursed upon his death. For the reasons that follow, we affirm the decision of the district court.

BACKGROUND

In 1995, plaintiff Brian Sullivan filed an action pursuant to 42 U.S.C. § 1983 against Suffolk County, Suffolk County Police Department, Police Officer John Cahill, and Police Officer Renee Buschor. Sullivan suffered cataclysmic injuries when Officer Cahill shot him in the back as he fled, unarmed, from police officers. Sullivan [**3] is permanently disabled. Because he [*284] requires extensive medical care, Sullivan sought Medicaid benefits through the Suffolk County DSS. As a condition of Medicaid eligibility, Sullivan assigned to DSS payments from a third party that was liable for his injuries. Pursuant to New York Social Services Law § 104-b, DSS filed a Medicaid lien against Sullivan's tort action and any resulting proceeds.

In January 1997 the parties agreed to settle the lawsuit and notify DSS that Sullivan intended to fund a supplemental needs trust with the settlement proceeds. A supplemental needs trust is a "discretionary trust established for the benefit of a person with a severe and chronic or persistent disability" and is intended to provide for expenses that assistance programs such as Medicaid do not cover. N.Y. Est. Powers & Trusts Law § 7-1.12(a)(5) (McKinney 1998); see Cricchio v. Pennisi, 90 N.Y.2d 296, 303, 660 N.Y.S.2d 679, 683 N.E.2d 301 (1997) (citing Bill Jacket, L. 1993, ch. 433).

On March 11, 1997, plaintiff proposed a settlement order and supplemental needs trust, which deferred payment of DSS's Medicaid lien until Sullivan's death. However, on March 25, 1997, the New York Court of [**4] Appeals held that a settlement recipient must satisfy a valid Medicaid lien filed pursuant to New York Social Services Law § 104-b before establishing a supplemental needs trust. Cricchio, 90 N.Y.2d at 309. In light of Cricchio, the parties agreed to reduce the

Medicaid lien to $ 200,000 and place it in an interest bearing escrow account until the district court decided when Sullivan had to satisfy the lien. If the district court ruled in favor of DSS, the $ 200,000 in escrow would be paid to satisfy the Medicaid lien. Otherwise, the money would be transferred to Sullivan's supplemental needs trust.

On April 30, 1998, the district court ruled that Sullivan must pay the DSS Medicaid lien before using the settlement proceeds to establish his supplemental needs trust. See Sullivan v. County of Suffolk, 1 F. Supp. 2d 186, 191 (E.D.N.Y. 1998). Judge Seybert rejected plaintiff's argument that federal law permits a trust beneficiary to defer until his death reimbursement for the "total" Medicaid services provided during his lifetime. See 42 U.S.C. § 1396p(d)(4).[2] The district court found that the statute upon which

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[2] Section 1396p(d) provides in relevant part:

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan. . . subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

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(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled. . . and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.
42 U.S.C. ° 1396p(d).

plaintiff relied pertains to eligibility for Medicaid [**5] and does not affect the priority of a Medicaid lien held pursuant to New York Social Services Law § 104-b. See Sullivan, 1 F. Supp. 2d at 189-190. The district court concluded that "although both federal and state law bar the imposition of a Medicaid lien on the recipient's property before his death, the federal and state laws do not suggest that settlement proceeds become the property of the recipient before they are placed in trust." Id. at 190. Because Sullivan assigned to DSS his right to settlement proceeds to the extent of medical assistance provided, the district court released the $ 200,000 in escrow for immediate satisfaction of the Medicaid lien. Sullivan now appeals.

DISCUSSION

Sullivan argues that the plain language of Section 1396p(d) authorizes [*285] him to defer reimbursement of DSS until his death, when the state will be reimbursed for the total amount of medical assistance it provided him throughout his lifetime. We review de novo the district court's interpretation of a statute. This court will "look first to the plain language of a statute and interpret it by its ordinary, common meaning." Luyando v. Grinker, 8 F.3d 948, 950 (2d Cir. 1993). "If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words." Greenery Rehabilitation Group, Inc. v. Hammon, 150 F.3d 226, 231 (2d Cir. 1998).

Medicaid is a jointly funded state and federal assistance program designed to pay the medical expenses of individuals whose income and resources are insufficient. See 42 U.S.C. ° 1396 et seq.; N.Y. Soc. Serv. Law § 363 et seq. Because Congress intended Medicaid to be the "payor of last resort", the state agency that administers Medicaid must seek reimbursement from any third party responsible for the patient's medical expenses. See Cricchio, 90 [**7] N.Y.2d at 305. (citing S. Rep. No. 146, 99th Cong., 2d Sess. 1, 312, reprinted in 1986 U.S. Code Cong. &

Admin. News 42, 279). Pursuant to federal law, Medicaid recipients must assign to the state their rights to seek and collect payment for medical care from a responsible third party. See 42 U.S.C. § 1396k.[3] n3 As part
of its recoupment power, the DSS as the agency administering Medicaid may place a lien on the Medicaid recipient's personal injury claims against a tortfeasor in order to recover the agency's medical expenditures. See N.Y. Soc. Serv. Law § 104-b(1). Section 104-b liens enjoy a specific exemption from the general rule that the state may not encumber a Medicaid recipient's property prior to death. N.Y. Soc. Serv. Law § 369(2).

In concluding that Sullivan must immediately satisfy the $ 200,000 Medicaid lien, the district court relied on a recent New York Court of Appeals decision that examined this state and federal assignment scheme. The New York Court of Appeals concluded that the state is entitled to satisfaction of a Section 104-b lien prior to the establishment of a supplemental needs trust. See Cricchio v. Pennisi, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301 (1997). The United States Court of Appeals for the Eighth Circuit (although not considering all the arguments raised here) reached the same conclusion in Norwest Bank of North Dakota v. Doth, 159 F.3d 328, 333 (8th Cir. 1998) (interpreting federal law in conjunction with Minnesota's assignment provisions which are similar in pertinent part to New York's assignment provisions).

Sullivan claims that using his tort settlement proceeds to establish a supplemental needs trust merely delays the satisfaction of the

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[3]The statute provides in relevant part that a State plan for medical assistance shall "provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required to assign the State any rights, of the individual. . .to payment for medical care from any third party." 42 U.S.C. 1396k(a)(1)(A).

Medicaid lien until his death and does not abrogate DSS's recoupment right. Sullivan argues that federal Medicaid eligibility law is dispositive and that Section 1396p(d) requires that the state be reimbursed for the "total [**9] medical assistance paid" at the time a trust beneficiary dies. Sullivan claims that if the words "total medical assistance paid" in the statute referred only to Medicaid provided after the establishment of the trust, then "total" would be superfluous. According to the statute, trust assets do not affect the beneficiary's medicaid eligibility as long the trust contains a "payback" provision allowing trust assets remaining upon the recipient's death to be used to reimburse the state for the total medical assistance it provided to the trust beneficiary. See 42 U.S.C. § 1396p(d)(1), (4).

[*286] We reject appellant's arguments for essentially the same reasons that the district court and the New York Court of Appeals set forth. Section 1396p(d) concerns the Medicaid eligibility of a supplemental needs trust beneficiary. The statute does not alter the assignment and subrogation scheme, and it therefore does not affect the state's right to satisfy its lien. In short, the state's right to recover the cost of medical care when the trust beneficiary dies has no bearing on the priority of the DSS lien.

Because the federal Medicaid eligibility rules do not govern the issue of Medicaid lien priority, [**10] the state and federal assignment and subrogation laws control. As a Medicaid recipient, Sullivan assigned his right to recover from a third party to DSS, up to the amount of medical assistance provided. See 42 U.S.C. ° 1396k.[4] DSS was entitled to any rights that Sullivan had to third

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[4]Title 42 U.S.C. ° 1396k provides:

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall

(1) provide that, as a condition of eligibility for medical

party reimbursement. See N.Y. Soc. Serv. Law § 367-a(2)(b). DSS pursued its right to recover from a responsible third party by placing a lien on Sullivan's lawsuit against the county. Because the Section 104-b lien attached directly to the tort settlement proceeds, the tortfeasor owes that money to DSS. Sullivan had no right to the $ 200,000 and could not use it to establish a trust.

We reject Sullivan's argument that deferral of reimbursement in no way alters the state's right to pursue its subrogation rights. Here, we agree with the district court that "timing is everything" in the realm of reimbursement for Medicaid expenses from a third party. Sullivan, 1 F. Supp. 2d at 190. The Medicaid recipient cannot defer payment of settlement proceeds to which he has no right. Moreover, Medicaid recipients may not use supplemental needs trusts for the unintended purpose of sheltering judgment and settlement proceeds from Medicaid lienors. See Norwest, 159 F.3d at 333. Therefore, we conclude that the federal Medicaid eligibility laws do not permit Sullivan to transfer tort settlement proceeds to a supplemental needs trust before he pays the DSS lien. Finally, we reject appellant's request for an allocation hearing to determine what portion of the settlement proceeds is payable to DSS because the district court properly relied on the stipulated settlement amount of $ 200,000.[5]

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assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance. . .to support..and to payment for medical care from any third party.

[5]Even if the parties had not stipulated the amount of the lien, an allocation hearing would not be necessary. The New York Court of Appeals recently held in Calvanese v. Calvanese, 1999 N.Y. LEXIS 228, 1999 WL 215967 *5 (N.Y. April 6, 1999) that the agency is entitled to full recovery once sufficient

July 21, 1999

We have considered Sullivan's remaining contentions and find them to be without merit. For the foregoing reasons we affirm the decision of the district court ordering that the $ 200,000 currently in escrow be paid to Suffolk County DSS in immediate satisfaction of its Medicaid lien.

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funds are made available by a responsible third party, regardless of what portion of the settlement is allocated to past medical expenses.

APPENDIX B

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration
6325 Security Boulevard
Baltimore. MD 21207

Sept. 30, 1993

Ms. Patricia Callahan
1013 Ocean Avenue
Bay Shore, New York 11706

Dear Ms. Callahan:

This is in further response to your letter to Mrs. Clinton which was referred to this agency for review. Please forgive the delay in my reply.

You had asked whether anything could be done, on a Federal level, to permit the creation of special needs trusts for severely handicapped children in a way that, presumably, would not cause them to lose Medicaid. Your daughter, who is disabled as the result of an accident, has received a monetary award. You would like to place the funds in a special needs trust for her benefit, but would also like to be able to use the funds for her benefit, without loss of Medicaid.

Prior to the enactment of the Omnibus Budget Reconciliation Act of 1993 (OBRA 93), a trust such as you describe would, in all likelihood, be counted under Medicaid as an asset to the beneficiary unless it were structured in such a way as to make the funds in the trust unavailable for use by the beneficiary. However, OBRA 93 changes the language of the Medicaid statute to permit the creation of a special needs trust for disabled children without the trust being counted for Medicaid purposes.

Briefly, the new legislation, which applies to any trusts established after August 10, 1993, provides that a trust created by

a parent, Grandparent, guardian, or a court, for a disabled person under age 65, using the assets of the disabled person, will not be counted in determining eligibility for Medicaid. To be noncountable, the trust instrument must also provide that the State will receive any funds remaining in the trust after the person's death, up to the amount of Medicaid benefits paid on behalf of the person.

If these conditions are met, the trust itself is not a countable resource for Medicaid purposes. However, it is important to note hat if funds are actually paid from the trust to or on behalf of the beneficiary, the payments actually made may be counted as income to the beneficiary in determining eligibility for Medicaid. While this does, to a certain extent, limit the beneficiary's use of the trust funds, this new provision of the Medicaid statute is, for the most part, a less restrictive treatment of trusts established for disabled children than was previously in effect.

Sincerely yours,

Sally K. Richardson
Director
Medicaid Bureau

APPENDIX C

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration
6325 Security Boulevard
Baltimore. MD 21207

December 30, 1993

Mr. Howard K. Gibbs
Assistant General Counsel
Litigation Division
Human Resources Administration
Office of Revenue and Investigation
66 Leonard Street, 7th Floor
New York, New York 10013

Dear Mr. Gibbs:

I an responding to your letter concerning the allegations made by Sonia Crannage. While we are not in a position to intervene in the matter between New York and Ms. Crannage in the case of Felicia Reyes, I can provide you with information on the Federal role in the Medicaid Program.

Federal law at section 1917(a) of the Social Security Act (the Act) and implementing regulations at 42 CFR 433.36 prohibit a State from imposing liens against the property of an individual prior to his death because of medical assistance paid or to be paid on his behalf under the State plan, except in very limited circumstances. It does not appear that any of the circumstances apply in this case.

However, another Federal law at section 1902(a)(25)(a) of the act requires States to ascertain the legal liability of third parties to make payments which Medicaid would otherwise have to make. A third party is defined in the regulations at 42 CFR 433.136 as any individual, entity, or program that is or may be liable to pay all or part of the expenditures of medical assistance furnished under the State plan. This includes any property judgment or

settlement from a tort or casualty liability claim.. Where such a legal liability exists section 1902 (a)(25)(B) of the Act requires a State to seek reimbursement for medical assistance payment already made.

A Medicaid recipient at the time of application and as a condition of eligibility for Medicaid, assigns to the State his or her rights to payment from any third party and must cooperate with the State in its pursuit of any third party who might be liable for payment as required by section 1912(a)(1) of the Act. Thus, under this provision in Federal law and the implementing regulation at 42 CFR 433.145, the Sate has claim to the amount recovered by the recipient, even though the State may not have been a party to the litigation.

If, under State law, a lien is not being placed upon the Medicaid recipient's property, but rather is being placed upon the tortfeasor's (the defendant in the personal injury litigation) property or upon funds which are set aside to be used in a settlement of the litigation but which have not become Ms. Reye's property, then there would be no conflict with section 1917(a) of the Act. This is because section 1917(a) only precludes States from placing liens on an individual's property. It would appear that New York has an interest in the potential personal injury settlement since Ms. Reyes' rights to recover payment for medical care must have been assigned to the State under section 1912 of the Act in order for her be eligible for Medicaid. In that event, if New York places a lien on these funds, it does not violate the Medicaid statute. However, it cannot impose a lien on any of Ms. Reyes' property which has not been assigned to the State.

It appears that the State has some options in dealing with Ms. Crannage. It could, if permitted under State law, place a lien on the tortfeasoer's property. It could agree with Ms. Crannage on a settlement of the tort action i which it gets an appropriate interest or it could intervene in the case and represent its own interests directly.

While this information is not intended to settle the differences you have with Ms. Crannage, I hope it helps you understand the Federal government's role concerning the administration of the State's Medicaid program.

Sincerely,

Sally K. Richardson
Director
Medicaid Bureau

APPENDIX D

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

6025 Security Boulevard
Baltimore, M.D. 21207

June 5, 1996

TO: ALL STATE MEDICAID DIRECTORS

SUBJECT: Treating Disability Trusts Under Transfer of Assets, Trust Estate Recovery, and Third Party Liability Rules and Information

Transfer and Trust Rules of OBRA'93

The Omibus Budget Reconciliation Act of 1993 (OBRA'93) generally tightened eligibility rules governing the use of trusts by Medicaid applicants and recipients to discourage the transfer or sheltering of income and resources. Section 1917 (c) of the Social Security Act (the Act) prescribes a penalty for individuals who transfer assets for less than fair market value. Section 1917(d) requires that States count, for purposes of an individual's Medicaid eligibility, trusts established by an individual (or certain other designated persons) if assets of the individual were used to form all or part of the trust coupus. An individual's 'assets' as defined in section 1917 (e)(1)(A), include all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or spouse is entitled to but does not receive because of action by the individual or by certain other designated persons or entities.

Recently, several State courts have focused the right of disabled individuals to receive Medicaid after assets they have received as a third party settlement or award have been placed into a trust.

Because of the definition of asset introduced by OBRA '93, the trust and transfer rules could apply to the proceeds of a disabled individual's settlement with or judgment against a third party, such as a casualty insurance company. The rules could apply if the individual would have otherwise been legally entitled to those proceeds had they not been diverted away from the individual into a trust.

To be covered by the trust rules in section 1917(d), a trust must have been established by an individual, other than by will, with assets of the individual forming all or part of the trust corpus. The trust is considered to have been established by the individual if it has been established by the individual: the spouse; a person, including a court or administrative body with legal authority to act in place of or on behalf of the individual or spouse; or by a person, including any court or administrative body acting at the direction or upon the request of the individual or spouse.

If a court establishes a trust on behalf of or at the behest of an individual, it is covered by the trust rules. If a third party establishes a trust to satisfy a judgment or to pay a settlement, and the trust is required by or approved by a court or administrative body, such a trust also falls within the coverage of section 1917 (d). The court or administrative body has acted, in its legal capacity, on behalf of or at the request of the individual, to help establish the trust. Even absent the involvement of the court, if the individual has requested a trust, or accepted the terms of a trust to resolve a claim, the trust established by a third party falls within the coverage of section 1917 (d) because the third party's actions are interpreted as those of a person action at the direction of or upon the request of the individual.

As a general rule, then, a trust which results from a third party award or settlement is regarded as subject to the trust rules. This means that the corpus of the trust, interest on the corpus, and payments from the trust will be considered as either available resources, income, or as transferred for less than fair market value,

depending upon the rules in section 1917 (d) relating to how the trust is constructed and how mush it can benefit the individual.

There are, however, several exceptions to the general rules which could apply to disability trusts established by third parties. Section 1917 (d)(4)(A) says that the trust rules do not apply to a trust containing the assets of a disabled individual under age 65. A second exception which could apply to third party settlements is contained in section 1917 (d)(4)(C). This exception applies to 'pooled' trusts which contain the assets of a disabled individual if the trust is established and managed by a non-profit association. Separate accounts must be maintained for each trust beneficiary, although these accounts may be pooled for purposes of managing and investing the trust fund.

How Third Party Liability TPL Rules and Assignment of Rights Effect Trusts

Federal law at section 1902 (a)(25)(A) of the Act requires States to take all reasonable measures to ascertain the legal liability of third parties to make payments which Medicaid would otherwise have to make. A third party is defined in the regulations at 42 CFR 433.136 as any individual, entity, or program that is or may be liable to pay all or part of expenditures for medical assistance furnished under the state plan. Where such a legal liability exists, section 1902 (a)(25)(B) requires a State to seek reimbursement for medical assistance payments already made.

All individuals, at the time of application and as a condition of eligibility for Medicaid, must assign to the State their rights to payment for medical care from any third party and, subject to several exceptions, must cooperate with the State in its pursuit of any third party who might be liable for such payment as required by section 1912 (a)(1) of the Act and 42 CFR 433.145 of the Medicaid regulations.

Thus, if an individual is already Medicaid eligible at the time he

or she receives a third party settlement or judgment, the State has claim to any portion of the proceeds which were intended to pay for medical care for the individual that is covered by Medicaid. If the individual negotiates with the third party to place these amounts in a trust or otherwise fails to help make the amounts available to the State, then that individual has violated the conditions of eligibility in section 1912 which requires the individual to cooperate with the State in obtaining payments for medical care from a third party. The individual would lose eligibility, regardless of the trust provisions and exceptions in sections 1917 (d)(4)(A) and (C).

If State law permits, a State can place a lien upon a third party's property, as in a situation involving the property of a tortfeasor or defendant in a personal injury suit, or upon fund which are set aside to be used in a settlement, but which have not yet become the property of the Medicaid applicant or recipient.

Section 1917 (a) precludes States from placing liens on an individual's property. However, because a potential personal injury settlement is not yet the plaintiff's property, it can be subject to a TPL lien. Also, proceeds placed in a trust are not the property of the individual, but belong to the trust. As such, a State could place a TPL lien on any proceeds in a trust which could be used to pay for medical care covered in the State's plan, provided there were State laws allowing this.

To avoid the lien issue, but protect its rights, a State could come to a agreement with a plaintiff on the settlement of a tort action in order to get an appropriate share. Alternatively, the State could intervene in the case and represent its own interests directly. Since the individual has assigned to the State his or her rights to recover payment for medical care under section 1912, the State has an interest which it can represent directly.

When TPL Does Not Affect a Trust

The situation is different if the individual receives a third party settlement or judgment prior to applying for Medicaid. At the time of application, the third party has extinguished its legal liability to the individual by paying off the judgment or providing settlement proceeds. As a result, the individual will no longer have a right to any third party payments to assign to the State. This would be the case, unless the trust itself has the purpose of providing medical care that would otherwise be covered under Medicaid ...trust as a liable third party. However, many trusts established as the result of a judgment or settlement are designed as 'supplemental needs' trusts. These kinds of trusts are drafted so that the trustee can only pay for items or services for the individual which are not covered by Medicaid and/or other similar programs.

How the proceeds of a judgment will affect a disabled individual depends upon their form. If the individual has received the proceeds outright and retained them, they are likely to be counted as income or resources that are available to the individual for eligibility purposes. These proceeds, if large enough, could render the individual ineligible. If, on the other hand, the proceeds have been placed in a trust, the result depends upon whether the general trust rules apply or whether the trust qualifies for an exception.

Trusts Which Meat the Exceptions in Section 1917(d)(4)

A disabled individual might avoid having the trust counted if the trust is designed to meet one of the exceptions in section 1917 (d)(4). To qualify for the exceptions, the trust must be established by an appropriate person or entity, as well as meet other requirements. For purposes of section 1917 (d)(4)(A), the trust must be established for a disabled individual under age 65 by a parent, grandparent, legal guardian, or a court (but not by the individual). If the trust is established by the court and meets the other (d)(4)(A) requirements, then it would be subject to this exception. If the third party itself establishes the trust at the

direction of or upon the request of any of the enumerated parties (all of whom are considered substitutes for the individual), the trust qualifies for this exception, with the third party acting, in effect, at the direction or upon the request of the individual.

The second exception for a disabled individual in section 1917(d)(4)(C), for a 'pooled' trust requires that the trust be established and managed by a non-profit association, with an account for the individual established solely for the individual's benefit by the individual, a parent or grandparent, legal guardian, or by a court. Again, if the trust account is established by the court, the exception would apply. The exception would also apply if the third party itself establishes the trust account at the direction of or upon the request of any of the enumerated parties.

Treating Excepted Trusts: Use of Funds and Estate Recovery

If the trust meets one of the exceptions, the Estate can monitor distributions from the trust to be sure that, in the case of a (d)(4)((A) trust, funds in the trust are used for the benefit of the disabled individual, and in the case of (d)(4)(C) trust account, soley for the disabled individual's benefit. Before the disabled individual dies, the State must collect whatever remains in the trust or account (if not retained by the "pooled" trust), up to the amount of medical assistance paid by the State.

If the State has not been totally reimbursed from the trust, then the State must follow the estate recovery rules in section 1917(b) of the Act. This provision requires that if an individual has been permanently institutionalized, the State must seek recovery from the individual's estate of any assistance correctly paid or upon sale of a home that has been subject to a lien imposed on account of medical assistance the State has paid.

Section 1917(b) also requires the State to pursue recovery from an individual's estate for the costs of nursing facility services, home and community-based services, and related hospital and

prescription drug services, in the case of individuals who received these services when they were age 65 or older. States can also choose to pursue the costs of any other items or services under the State plan for these same individuals.

If you or your staff have any questions concerning the above, please contact your regional office.

Sally K. Richardson
Director
Medicaid Bureau

cc: All Associate Regional Administrators
Division of Medicaid

APPENDIX E

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration
6325 Security Boulevard
Baltimore. MD 21207

Sept. 9, 1996

Ms. Patricia L. Harrison
Attorney at Law
810 Bellwood Road
Columbia, South Carolina 29205

Dear Ms. Harrison;

I am responding to your recent letter to Sally Richardson in which you asked for additional clarification of her memorandum to all State Medicaid directors covering the treatment of disability trusts under transfer of assets, trusts, estate recovery, and third party liability rules. You state that you still have questions about the timing of a State's recovery from a supplemental needs trust.

Specifically, you have asked about a State's right to recover from the proceeds of personal injury settlements when the settlement is placed in a supplemental needs trust covered under §1917 (d) (4) (A) of the Social Security Act (the Act) (42 U.S.C. §1396 p(d) (4) (A)). Your main concern appears to be whether a State can assert its claim prior to when the trust is actually funded by the settlement proceeds. You state that you believe that the Supreme Court of Nassau County, New York, was correct in the Link case, which held that congress intended that the State recover only after the death of the disabled person.

You have stated that you believe that, if a State can recover before funds are placed in a special needs trust, a disabled person is at risk of losing all of the benefits from a settlement simply because the tortfeasor delayed settlement. Your letter than describes, in the last paragraph on the first page, some questions relating to the timing of the settlement or the timing of when the disabled person

assigns his interest in the lawsuit to the trust.

It is our view that the issue if timing has an effect only in terms of whether a tort settlement occurs before or after an individual is eligible for Medicaid. If an individual is eligible for Medicaid, then he or she has, as a condition of eligibility under §1912 (a) (1) (A) (U.S.C. § 1396k (a) (1) (A)) already assigned to the State any right he or she has to the payment of medical care from any third party. Once the individual becomes Medicaid eligible, the State stands in that individual's place in terms of any payments for medical care covered under Medicaid that the individual has right to receive from any third party, from the day forward, until the individual's eligibility ends. If the State is in a position to represent its own interests in the case, it can request compensation not just for money it has already spent on the plaintiff's medical care, but for future expenses, just as a plaintiff who has not assigned these rights could in representing his or her own interests in covering future medical costs.

If an individual is Medicaid eligible at the time of settlement or judgment, the State has claim to any portion of the proceeds that were intended to pay for medical care for that individual that is covered under Medicaid, and that the individual needs as the result of injury caused by the tortfeasor. Neither the tortfeasor nor the plaintiff has the right to place Medicaid's claim out of reach by diverting it into a trust that benefits the plaintiff and not the State.

You mentioned in your letter the holding in the Link case, in which the court held that Congress intended that the State recover only after the death of the disabled person. unlike the court in Link, we do not believe that §1917(d)(4)(A), which cover certain special needs trusts for disabled individuals influence the outcome of the rules covering an individual's assignment of rights to third party liability payments. Section 1917(d)(4)(A), in turn excepts from the count amounts that are in certain existing trusts for disabled individuals under age 65, when those trusts are established for the benefit of the individual by a parent,

grandparent, legal guardian or by a court.

There is no indication whatsoever that Congress meant to do anything in this provision but exempt from eligibility determinations that contents of an existing special needs trust. That is, the statutory language and legislative history include no indication that Congress meant to override or interfere with the assignment provisions in §1912(a). the court in Link admits that "(i)t may well be that Congress did not specifically consider personal injury actions and liens thereon in enacting the Federal SNT [special needs trust] exemptions,..." (December 14, 1994 N.Y.L.J. 32, col. 4) Rather than relying on the statute or legislative history, the court conjectures that the intent of Congress must have been to allow trusts to be used to supplement the needs of disabled persons without adverse Medicaid consequences, but with the potential for full Medicaid reimbursement.

The issue of the timing of a settlement produces a different result when a settlement takes place before an individual applies for Medicaid. As we described in the June 5, memorandum, the third party has extinguished its legal liability at this time by paying off the judgment or providing settlement proceeds. As a result, the trust is not available to the State under assignment, unless the trust itself has the purpose of providing medical care covered under Medicaid. In that situation, the trust itself could serve as a "third party" that is liable to pay for the plaintiff's medical care.

If we can be of further assistance please call Robert Nakieiny at (410) 786-4466.

Sincerely,

Steve McAdoo
Acting Director
Medicaid Bureau

cc: Associate Regional Administrator
Division of Medicaid

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
BRIAN SULLIVAN,
Plaintiff,

-against-

cv-95-1533
S T I P L A T I O N
REGARDING MEDICAID
LIEN

COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT, POLICE OFFICER JOHN CAHILL and POLICE OFFICER RENEE BUSCHOR,
Defendants.
----------X

WHEREAS, the parties have agreed to settle the above action,

WHEREAS, there remains one outstanding legal question, i.e., whether a Medical Assistance lien for medical services provided prior to the establishment of a Supplemental Needs Trust must be satisfied prior to the establishment of the SNT or whether reimbursement for Medical Assistance shall be deferred until the death of the plaintiff,

THEREFORE, the parties hereby agree to the following:

1. The action will be settled for $1,400,000.00. The amount of the lien of the Suffolk County Department of Social Services, the local Social Services district of the State of New York within the County of Suffolk, (hereinafter "Department") is $555,959.26. There has been a compromise with respect to this lien insofar as the Department agrees to forebear the immediate satisfaction of the entire amount of its lien, provided that the sum of $200,000 shall be deposited into an interest-bearing escrow account, to be held in accordance with the terms of this stipulation.

2. Payment by defendant to plaintiff shall be made within six (6) weeks. The payment shall be made to plaintiff's attorney, Roger Kunkis, Esq. to be placed in an interest-bearing escrow account.

3. From that escrow account, plaintiff's counsel shall pay to plaintiff's counsel reimbursement for disbursements and legal fees in accordance with the retainer agreement filed with the Office of Court Administration and then shall pay to the Supplemental Needs Trust Fund, approved by Suffolk County Department of Social Services, the local Social Services District designated by the State of New York, all of the remaining monies except for $200,000.00 which will remain in the interest bearing escrow account, referenced herein.

4. The said $200,000 shall remain in an interest bearing escrow account until United States District Court Judge Seybert renders her decision on the legal issue as to whether the Medical Assistance lien shall be satisfied for $200,000 prior to the establishment of the SNT as per the New York State Court of Appeals decision in Cricchio v. Pennisi and Link v. the Town of Smithtown or whether reimbursement to the Department for medical assistance benefits provided prior to the settlement of this action be deferred until the death of the plaintiff as argued by the plaintiff.

5. If the District Court renders a decision favorable to the Department, then the monies in the escrow account will be paid to the Department unless a stay of the payment is secured by the plaintiff. The Suffolk County Attorney's Office shall provide written verification that the funds have been paid to the Department, to be processed in accordance with State and Federal regulations governing the State Medicaid program.

6. If the District Court renders a decision favorable to the plaintiff and the Department decides to appeal, then the escrow monies shall be paid to the Trustee of the Supplemental Needs Trust.

7. If the District Court renders a decision favorable to the plaintiff and Department decides to appeal, then the monies shall remain in the escrow account until all appeals have been

exhausted. After all appeals have been exhausted, if the final decision is favorable to the plaintiff, then the monies in the escrow account shall be paid to the Trustee of the SNT. If the final decision is favorable to the Medicaid agency, then the monies shall be paid to the Medicaid agency pursuant to paragraph 5.

8. If any monies are used from the Supplemental Needs Trust Fund to purchase or finance the purchase of a homestead and/or land upon which a homestead is to be built, the real estate asset shall remain an asset of the Trust, subject to the provisions of the Supplemental Needs Trust Fund. If any real estate is ever sold, and plaintiff purchases another homestead, the real estate purchased shall also be an asset of the Trust. In the event that no other real estate is purchased, the proceeds from the sale of the property shall remain as an asset of the Supplemental Needs Trust Fund. The intent of the parties in this regard is that the proceeds which are used to purchase any real estate, are to remain an asset of the Trust.

9. If the plaintiff seeks to have any invasion of principal from the Supplemental Needs Trust Fund, there must be prior approval by the Suffolk County Department of Social Services based on the standards as established in the New York State regulations. Any invasion of the principal shall be solely for the benefit of the plaintiff.

Dated: April 24, 1997

State of New York)
County of Suffolk)ss
Before me this 13th)
day May, 1997)

_____
On behalf of the Medicaid agency - Suffolk County D.S.S.

_____
On behalf of the plaintiff

_____
BRIAN SULLIVAN

_____
MARIE FLAUM

_____
On behalf of its defendants

_____
U.S. District Judge

DATED: July 9, 1997